XUE & ASSOCIATES, P.C.
Benjamin B. Xue, Esq.
1 School Street, Suite 303A
Glen Cove, NY 11542
Tel.: 516-595-8887
Fax: 212-219-2276
Attorneys for Respondent

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

----------X
In the Matter of:

MATSU CORP. d/b/a Matsu Sushi,

Case No.: 01-CA-214272

Respondent,

And

FLUSHING WORKERS CENTER

Charging Party.
----------X

RESPONDENT'S BREIF IN SUPPORT OF EXCEPTIONS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF THE CASE

This brief is submitted in support of Matsu Corp.'s exceptions to the Decision of Administrative Law Judge Kenneth Chu (ALJ) issued on October 26, 2018 in the matter of Matsu Corp., Case 01-CA-214272, reported at JD-14-18. This matter was heard by ALJ Chu on July 30, 2018.

The complaint alleged that Matsu Corp. violated Section 8(a)(1) of the National Labor Relations Act (Act) by discharging employees Liguo Ding and Jianming Jiang because they engaged in protected concerted activity for mutual aid and protection by refusing to work under unsafe working conditions.

The ALJ's Decision found that Matsu Corp. terminated Liguo Ding and Jianming Jiang for engaging in protected concerted activity for mutual and aid and protection in violation of 29 U.S.C. § 158. The ALJ recommended his findings to the National Labor Relations Board (the Board).

The parties engaged in the Alternative Dispute Resolution (ADR) program but were unable to reach an agreement. The deadline to file exceptions to the ALJ's decision along with a supporting brief was extended one month and then tolled while the parties were in the ADR program. The new deadline is January 22, 2018 and thus, the exceptions and the supporting brief are timely filed.

STATEMENT OF THE ISSUES

The issues presented in these Exceptions are:

1) Whether the ALJ afforded proper weight to the testimony of the parties in this case.
2) Whether the ALJ properly considered evidence of an investment dispute when deciding why Liguo Ding and Jianming Jiang refused to work.
3) Whether the ALJ was correct in limiting introduction of evidence of an investment dispute between Liguo Ding, Jianming Jiang, and Matsu Corp.
4) Whether the ALJ erred in concluding that Liguo Ding and Jianming Jiang engaged in protected concerted activities for mutual aid or protection.
5) Whether the ALJ erred in concluding that Matsu Corp. fired Ding and Jiang.
6) Whether the ALJ erred in concluding that General Counsel has met his burden that the discharge of Ding and Jiang was motivated by their protected concerted activity.

STATEMENT OF FACTS

Matsu Corp. d/b/a Matsu Sushi (Respondent) is a restaurant in Westport, CT., approximately fifty miles from New York City. The restaurant serves Japanese cuisine, including sushi. The restaurant employs about 12 people, including wait staff, chefs and kitchen employees. Yan Lin (Lin) is the manager of the restaurant. Lin reports to Michael Cao (Cao), a majority shareholder. Jianming Jiang (Jiang) and Liguo Ding (Ding) supervised kitchen staff and worked in the kitchen. Both Jiang and Ding were 5% shareholder of the Respondent. The restaurant is open Monday to Thursday from 11:00 a.m. until 10:00 p.m., Fridays from 11:00 a.m. until 11:00 p.m., and Saturday to Sunday from 12:00 p.m. until 10:00 p.m.

Occasionally, employees were assigned to work on "big order." Tr. 21:25-22:3.[1] These were orders to provide food for large groups of people. Tr. 22:4-6. Lin would post notice upon receipt of the big orders onto a group chat and the employees divided the work amongst themselves. Tr 26:7-26:18. Ding and Jiang made arrangements for the big orders. Tr. 111:14-23. Employees prepared food in the week leading up to the delivery date and then cooked the food during a five-hour shift from 1:00 a.m. until 6:00 a.m. the morning of the delivery. Tr. 22:5-23:16. The day before a delivery an employee worked his normal shift. Then there was an extended period of rest until 1:00 a.m., when the overnight shift began. The overnight shift ended at 6:00 a.m., and the employees would take another extended rest until the next shift began at 11:00 a.m. During extended periods of rest employees would sleep on the second floor of the restaurant. Tr. 116:17.

In 2017 Jianming Jiang and Liguo Ding each owned five percent of the shares in Matsu Corp. Tr. 105:12-13. They had been receiving dividends in addition to their normal wages for over ten years. Tr. 105:23-106:12. In 2015, Matsu Corp. purchased Matsuri Sushi, another restaurant. Tr. 18:13-14. The investment performed poorly, and Matsuri Sushi closed in September 2017. Tr. 18:14. Soon after, Mr. Ding and Mr. Jiang asked Cao and Cheng to return their investments, including investments in the closed Matsuri Sushi. There were disagreements over the valuation of Ding and Jiang's shares. Tr. 38:7-17.

Ding and Jiang both worked at the restaurant for over fifteen years. Tr. 55:12, 83:13. Prior to the failed investment in Matsuri Sushi, Ding and Jiang never refused to work a big order, reported any health concerns as a result of a big order, or took time off as a result of a big order.

[1] Tr stands for hearing transcript dated July 30, 2018 annexed hereto as Exhibit A.

Tr. 41:4-21, 46:2-5, 67:19-24, 90:15, 110:12-16. In addition, there were no disciplinary problems in the workplace. Tr. 48:11.

However, following the investment dispute, Ding and Jiang's attitude in the workplace sourced. They began smoking the restaurant and would talk on the phone while others were working. Tr. 39:4-8. Coworkers and customers began lodging complaints about the behavior. Tr. 33:19, 35:24, 108:21-109:16. In one instance, a customer complained about smoke in the store. Jiang denied he was smoking. An angry pregnant woman rushed into the kitchen and witnessed Jiang smoking. Tr. 33:22-34:3.

In September 2017, following the deteriorating relationship between Jiang, Ding, Cao, and Cheng, Ding and Jiang worked a big order. They both worked the shift the day before the delivery, worked the overnight shift, and then took turns working the shift following the delivery. Tr 22:25-23:16. Neither employee complained of any health concerns following this big order. Tr 41:4-21. Neither employee took any time off for health reasons.

In early December 2017, Lin, posted a notice regarding a big order with a December 14, 2017 delivery date on a group chat. Tr. 26:2-14. On December 6, 2017 Ding spoke to Lin in the company van on the way to work. Ding informed Lin that he would not work the five-hour overnight shift for the December big order. Tr. 27:19-28:1. He claimed it was due to health concerns. *Id.* On December 7, 2017 Lin asked Ding if he would reconsider working the overnight shift for the December big order. Ding refused. Lin asked if he was refusing to work the overnight shift because of the investment dispute. Ding admitted that that was one reason he was refusing to work. Tr. 63:5-8.

Jiang called Lin on December 6, 2017 and informed her that he would not work the overnight shift as well. Tr. 28:25-29:4. Ding and Jiang did not work the overnight shift for the December big order.

On December 8, 2017 Lin called Ding and Jiang and told them to rest at home because they claimed that they were not in good health. Lin informed them that when their health improved, they should contact the employer. Tr. 32:6-16. Jiang and Ding did not show up for work after December 8, 2017. The only two people with authority to fire Ding and Jiang were the majority shareholders, Cao and Cheng. Tr. 46:20, 49:21-24. Ding and Jiang never contacted Cao or Cheng after leaving work on December 8, 2017. They never relayed to Cao or Cheng that they thought they had been fired even though they had Cao and Cheng's contact informaton. They never complained to Cao or Cheng about being fired. They never approached Cao or Cheng to complain about the big orders. In addition, they contacted Lin to collect wages they were owed after December 8, 2017, but other than that Lin had no contact with them as well. Tr. 46:9-12. Ding and Jiang never asked to return to work.

ARGUMENT

I. THE ADMINISTRATIVE LAW JUDGE GAVE IMPROPER WEIGHT TO DING AND JIANG'S SELF-SERVING AND CONFLICTING TESTIMONY

The Administrative Law Judge claims that Respondant terminated Ding and Jiang's employment because they engaged in protected concerted activities for the purpose of mutual aid and protection, violating of Section 8(a)(1) of the National Labor Relations Act. Most of the evidence supporting the allegation termination and alleged engagement in concerted activities for

the purpose of mutual aid or protection comes from Ding and Jiang's own self-serving and self-contradictory testimony. Their testimony should be disregarded or viewed with heavy skepticism in light of their material contradictory statements throughout the record, penchant for exaggeration and misrepresentation, and nonresponsive nature under cross examination.

A. Ding and Jiang's testimony that they worked 70 hours a week is unreliable and contradicted by their own statements and other evidence and testimony

Ding and Jiang both testified that they worked 70 hours a week. This testimony was offered to bolster their allegations about long hours and unsafe working conditions at the employer's workplace, in support of the fabricated theory that Ding and Jiang's refusal to work was for mutual aid and protection. This 70-hour work week is largely exaggerated and not supported by the facts of this case and common sense.

Ding testified that he worked about 70 hours a week. However, when asked to give a description of his shifts by the hour, his testimony varied wildly. First, instead of giving a start time for his shifts, Ding stated when he left his home. In other words, all of his calculations with regards to hours worked included travel time to and from the restaurant even though the restaurant provided transportation for them from Flushing, NY to Westport, CT. Any conclusion of hours work based on Ding's testimony will be inherently flawed because they would all use start times of when he left his home and end times of when he arrived at his home.

Ding then claimed he finished work around 10pm. However, when he broke down his schedule by day, he claimed that on Fridays and Saturdays he worked until 11pm and from Monday to Thursday he finished work at around 11pm. These two contradicting end times for his shifts will make it even more difficult to discern how many hours he worked each week.

In addition, Ding also mentioned that by the time he got home it would be midnight. Ding already claimed that he was factoring travel times into his hours worked calculation. If this is the case, all of his end times should be 12:00am.

Ding claimed to "finish work" by 10pm in one instance, 11pm in another instance, and also imply that his workday ends at 12:00am. Without a clear start or end time to his schedule, it's impossible to rely on Ding's testimony to figure out how many hours a week he worked.

Ding's testimony as to the hours he worked also conflicted with the hours of operation for the restaurant. The restaurant is open from 11am – 10pm Monday to Thursday, 11:00am – 11:00pm on Friday, and 12:00pm – 10:00pm on Saturdays and Sundays. The restaurant opens at different times depending on the day, yet Ding maintained that he left the house every day at 8am. Similarly, the restaurant closed at different times throughout the week, yet Ding maintained that he arrived home around midnight.

Jiang also claimed that he and Ding worked 70 hours a week. However, his calculations included time spent commuting and time spent on big work orders. With regards to the big orders, Jiang claimed that they'd have to work 36 hours and would receive no breaks and that he factored that into his calculations. However, on cross examination, Respondent's cousel asked Jiang to confirm that he had only participated in one big order in the six months leading up to December 2017. Jiang replied that he did not remember. His calculations were based on work done on big orders, but he could not even remember how many big orders he participated in in the six months leading up to December 2017. Any estimates on his work hours are thus not credible and should be disregarded.

Ding and Jiang's testimony also conflicted with the testimony of Yan Lin, the manager of the restaurant. Lin testified that Ding worked 51 or 52 hours a week. Lin is manager of the restaurant and is responsible for tracking the hours worked and handing out pay to the employees. She kept records of the days each employee worked, and the hours worked each day was generally fixed. As such she was in a better position to gauge how many hours the employees worked.

Thus, the Board should disregard Ding and Jiang's testimony that they worked 70 hours a week and accept the more credible and sensible testimony from Lin that kitchen staff worked 51 or 52 hours a week.

B. Ding and Jiang's testimony that they worked for 36 hours straight during big orders is grossly exaggerated and not supported by other evidence and testimony in the record

The ALJ determined that Ding and Jiang were terminated for engaging in concerted activities for mutual aid and protection. Crucial to that determination is the claim that they were protesting unsafe working conditions. To bolster this claim Ding and Jiang testified that they were required to work 36 hour shifts for the big orders. However, this allegation of 36-hour shifts is a gross misrepresentation and is not supported by the facts of this case and common sense. Ding and Jiang put forth contradictory and incredulous testimony to support the 36-hour shift claim. This testimony is not credible and should be disregarded in its entirety. Ding and Jiang's testimony to other facts of this case should be viewed under heavy suspicion in light of their implausible testimony.

Ding and Jiang claimed that the employer required them to work for 36 hours nonstop to complete big orders. They would work a normal shift until 10pm. Then the other workers left,

and they would begin processing food for the big order. They would work through the night and into the next day cooking the food. They would deliver the food to the client in the morning and then continue with the normal shift the day of the delivery and finish that shift at 10pm. Throughout this 36-hour shift, they were not permitted to sleep, could not take any breaks, and did not have time to eat any meals.

Ding and Jiang grossly misrepresented the working conditions of the big order. Ding admitted that in the past he worked roughly one big order a week. He has been working with this employer since 2003. If Ding's testimony is true, he has worked 36 hour shifts once a week since 2003 and never complained, presented medical evidence of harm resulting from such shifts, or refused to work such an onerous shift. That would have been 14 years performing a dangerous job involving open flames, sharp utensils, and other dangerous conditions once a week for thirty-six hours straight with no rest or food. Such an extreme claim requires more foundation than the self-serving statements of two individuals.

Weighing against them is the common-sense notion that human beings cannot sustain that kind of toil. The obvious conclusion is that Ding exaggerated the number of hours worked and time allotted for breaks and rest during these big orders.

Ding and Jiang's statements fly in the face of more reliable and credible testimony from the manager, Yan Lin, and shareholder and head sushi chef Michael Cao. Referring to the September 2017 big order, Lin gave credible account of the typical work schedule surrounding a big order. For the September 2017 big order Ding and Jiang worked the shift the day before the deliver from 11:00am – 11:00pm. There was an extended period of rest from 11:00pm until 1:00am before they both worked the overnight shift from 1:00am – 6:00am. After another extended period of rest, both employees took turns working the full shift following the delivery.

Contrary to Ding and Jiang's testimony, there were three separate shifts with extended periods of rest in between. The total number of hours worked for these shifts was significantly less than 36. It is normal shift plus about 5 hours work from 1am to 6pm. It should also be noted that neither Ding nor Jiang mentioned that they took turns on the shift following the delivery.

Cao later provides more detail on how the shifts surrounding the big orders are structured. There are two extended periods of rest in between shifts. The first is from 11:00pm until 1:00am. The second is from 6:00am until 11:00am. During these periods, employees can sleep on the second floor of the restaurant.

Cao and Lin's creditable testimony further demonstrate how far Ding and Jiang exaggerated the working conditions of the big order shifts. The 36-hour shift claim is an integral fact directly stated in the complaint. It is the buttress upon which the Section 8(a)(1) violation rests. Therefore, both witnesses have put forth unreliable testimony about a material fact. Their testimony should be discredited with regards to the 36-hour shift claim and viewed with heavy suspicion with regards to other facets of this case.

C. Ding and Jiang were Generally Nonresponsive Under Cross Examination

Ding and Jiang's lack of credibility can be further observed in their nonresponsive nature under cross examination. On cross examination, the employer's counsel asked Ding if Marty Cheng came to the restaurant for shareholder meetings and meals. Tr. 78:23. Ding stated that he did not know the purpose of the visits. Tr. 78:25. This response is directly contradicted by earlier testimony from Lin, the manager of the restaurant. She stated that occasionally there would be shareholder meetings. Then they (employee/shareholders) would communicate with the owners (of which Marty Chen is one). Tr. 24:18-20. Plaintiff's counsel called Lin as their

witness and made no attempt to rebut her statement that employees talked to the owners at these shareholder meetings. In this light, Ding's claim that he did not know why Cheng was in the restaurant is evasive and suspicious. Ding would like to downplay the role of Ding and Jiang as shareholders in order to make it seem as if they refused to work as a result of unsafe working conditions, instead of a shareholder dispute. Ding's evasive answer here is nothing more than an attempt to avoid the shareholder issue.

Later in the hearing, on direct , Ding claimed that on December 7, 2017, Lin asked him if he would work the overnight shift one more time. There was no indication of any threat. Tr. 62:25-63:10. However, on cross examination, Ding changed his testimony when asked about his conversation with Lin on December 7, 2017. He then claimed that Lin threatened him to finish the order or be liable for any consequences. Tr. 74:16-19. Yet he never reported this threat to Cao or Cheng. He had Cao and Cheng's contract information and they were also on the same WeChat groups. Furthermore, Jiang testified that he never received any threats from Lin. Tr. 97:2. When the employer's counsel asked Jiang if he had any knowledge of Lin threatening Ding., Jiang replied "I don't know." Tr. 97:12. However, Ding and Jiang previously testified that when this alleged threat took place, they were supposedly in frequent and constant communication planning their protest and conferring with each other and their counsel. Tr. 84:13-85:6. It seems implausible that if Lin had threatened Ding to work the big order, Jiang would have no knowledge of it.

On cross examination, the employer's counsel asked Jiang if he ever asked not to do a big order before December 2017. Instead of answering yes or no, Jiang launched into an account of how he refused the December big order for health reasons. His answer was totally non-responsive to the question posed and a simple yes or no response would have sufficed.

The record is littered with other instances of non-responsiveness on the part of Ding and Jiang. This nature of testimony highlights their evasiveness and untrustworthiness while testifying and further detracts from their credibility. *See* Tr. 59:10, Tr. 90:15.

II. THE ADMINISTRATIVE LAW JUDGE ERRED IN FINDING THAT DING AND JIANG ENGAGED IN PROTECTED CONCERTED ACTIVITY FOR MUTUAL AID OR PROTECTION

A. The Administrative Law Judge Did Not Properly Consider the Evidence of Ding and Jiang's Refusal to Work Due to Failed Investment

Ding and Jiang did not engage in protected concerted activity for mutual aid or protection when they refused to work the December big order. The NLRA forbids an employer from interfering with, restraining or coercing employees in the exercise of the rights guaranteed in Section 7. 29 U.S.C. § 158. Section 7 gives employees the right to engage in concerted activities for the purpose of mutual aid or protection. 29 U.S.C. § 157. Mutual aid or protection generally means efforts to improve the terms and conditions of employment. *See Eastex, Inc. v. N.L.R.B.*, 437 U.S. 556, 564-70 (1978).

The ALJ found that "Ding and Jiang engaged in protected concerted activity when they mutually agreed after the September large catering order that they [would] not work another big order with a 36-hour work shift due to their health and the concerns of their family over their safety in working long hours." ALJ Decision 7:20-23. This finding completely ignores the real reason Ding and Jiang refused to work. The evidence and testimony show that Ding and Jiang refused to work the big order due to the dispute over their investments. Yet the ALJ barely addressed this. He stated, "[w]hile there may be other factors, I find above that their discharges

were clearly motivated by their protected concerted activity in refusing to work the early shift and I need not address the reasonableness of their concerted activity." ALJ Decision 10:28-30.

The judge then references *Tamara Foods Inc.*, 258 NLRB 1307, 1308 (1981) and repeats the conclusion that "inquiry into the objective reasonableness of employees' concerted activity is neither necessary nor proper in determining whether that activity is protected." *Id.* "Whether the protested working condition was actually as objectionable as the employees believed it to be ... is irrelevant to whether their concerted activity is protected by the Act." *Id., Odyssey Capital Group, L.P., III, 337 NLRB 1110, 1111 (2002).* This inquiry into the reasonableness of the concerted activity has no bearing on the current case.

The issue in *Tamara* was the manner of the employee's concerted activity. The administrative law judge in that case improperly considered the *manner* in which the employees protested when considering whether they were protected by Section 7. The manner of protest is not at issue in this case. The Decision and Order for this case leaves out a crucial previous sentence when citing Tamara. The full cite should read "[t]he general rule is that the protections of Section 7 do 'not depend on the *manner* in which the employees choose to press the dispute, but rather the *matter* that they are protesting.' Inquiry into the objective reasonableness of employees' concerted activity is neither necessary nor proper in determining whether that activity is protected." The inquiry into the objective reasonableness of employees' concerted activity is in reference to how they acted, not why they were acting, which is what is being disputed in this case. Similarly, "whether the protested working condition was actually as objectionable as employees believed it to be" is irrelevant in this case. There issue here is not necessarily whether Ding and Jiang's working conditions were objectionable, but rather if that was the source of their protest. The analysis from Tamara does nothing to answer that question.

The record, however, although hindered by ALJ's refusal to allow additional testimony regarding the investment dispute, contains compelling evidence and testimony that Ding and Jiang's refusal to work was tied to their failed investments. Matsuri Sushi restaurant closed in September 2017. Tr. 18:13-14. That is also when Ding and Jiang supposedly started having health problems. Tr. 58:5-11. Ding testified that on December 7th at around 2 p.m. Yin asked him if he stopped working because he had not received his deposit.[2] Tr. 63:4-5. Ding admitted that the fact that the boss had not refunded the deposit influenced his decision not to work. Tr. 63:5-8. Ding claimed that the work he did on previous big orders made him sick. Yet he never presented a doctor's note. Tr. 46:5. He never made any complaint about his health until the dispute over the investments arose. On cross examination, when asked if he had previously refused any big order shifts, Ding stated:

> "In the past, we got in these big orders. Since we had a deposit made – placed at a company and the boss promised us that they would – he would give us some reward from the restaurant's profits, and because of that we would still work even though we were very tired."

Tr. 67:20-24. This answer demonstrates that he was fine working big orders so long as the restaurant was profitable and he received dividends stemming from his rights as a shareholder, not an employee. It also shows that his health and safety was not a concern so long as he was receiving steady dividends. The only thing that changed from previous big orders to the September and December 2017 big orders was the failure of the Matsuri restaurant and resulting

[2] Throughout their testimony, Ding and Jiang referred to their investments as "deposits."

lack of dividends. Ding and Jiang were not pleased by the lack of dividends and it was this investment dispute that spurred their refusal to work the December 2017 big order.

Jiang claimed he did not work the big order for health and safety reasons. Yet he also never presented a doctor's note or gave any indication that work was adversely affecting his health prior to receiving notice of the December 2017 big order. The timing suggests that the refusal to work was an attempt to punish or leverage Cao and Cheng with regards to the investment dispute.

These are all compelling facts that point to the true motive behind Ding and Jiang's refusal to work. The administrative law judge did not address any of these facts in his decision and completely ignored the admitted fact that Ding and Jiang's actions were a result of their investment dispute with the restaurant majority owners. The failed investment is material to this case, as it shows that Ding and Jiang were motivated by reasons other than "to improve terms and conditions of employment or to otherwise improve their lot as employees." *Eastex, Inc. v. N.L.R.B.*, 437 U.S. 556, 565 (1978).

B. The Administrative Law Judge Improperly Limited Evidence of Ding and Jiang's Dispute with Respondent over Failed Investment.

Not only did ALJ Chu ignore evidence with regards to the investment dispute, he actively sought to exclude such testimony. In the decision, the judge states

> "I allowed limited testimony solely for background information regarding another restaurant also owned by Cao and Cheng. At the time, Cao and Cheng were principals in the Matsu Corporation. The Respondent Matsu purchased a second restaurant named Matsuri Sushi. Ding and Jiang were investors in Matsuri Sushi in August 2015, but the restaurant closed in September 2017. Cao testified that Ding and Jiang argued with him

> and Cheng for the return of their investment in the failed restaurant. Cao stated this was the reason for Ding and Jiang refusing to work the big order on December 14."

ALJ Decision n.9. The testimony regarding Matsuri Sushi was not background information. Establishing facts around the investment in that restaurant was key to showing the true motivation behind Ding and Jiang's protest. Yet, the administrative law judge actively limited such testimony and only references it in a footnote in his final decision. Proper weight was not afforded to the failed investments of Ding and Jiang and the role they played in their decision not to work. The Administrative Law Judge improperly limited the scope of testimony at the hearing, hampering the Respondent's ability to present its case. See Tr. 36:2-24.

All of these facts, taken together, show that Ding and Jiang were motivated by the investment dispute and protesting as shareholders, not employees. Their protest was not related to wages or working condition. Therefore, their protest was not for mutual aid and protection and does not enjoy the protection of Section 7 of the NLRA.

III. THE ADMINISTRATIVE LAW JUDGE ERRED IN FINDING THAT MATSU CORP. FIRED DING AND JIANG

Respondent did not terminate Ding and Jiang. 29 U.S.C. § 158 states that it shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in 29 U.S.C. § 157. The evidence has clearly shown that Jiang and Ding were not exercising any relevant rights, since their actions were in response to an investment dispute. However, even if they were, Matsu Corp. did not interfere with, restrain, or coerce Ding and Jiang in the exercise of those rights because Matsu Corp. did not terminate Ding and Jiang.

After Ding and Jiang made complaints about their health, Lin asked them to take a rest from work. When they were feeling better, they should inform the employer. This took place December 8, 2017. Tr. 32:6-16. Ding and Jiang reported to work that day and never showed up again. They reached out to Lin to inquire about the balance of their wages but otherwise they never reached out to Lin, Cao, or Cheng until the commencement of this action. Tr. 46:9-12.

Ding and Jiang testified that they called Lin after their last day at the restaurant (December 8, 2017) to ask when they could return. Tr. 63:21-64:7; Tr. 87:1-11. However, their testimony is not credible. Lin and Cao have testified on their behalf and for Mr. Cheng that they never received any such calls from Ding or Jiang. Ding and Jiang both admitted that they never reached out to Cao or Cheng. Ding and Jiang's testimony has been shown to be unreliable. Cao and Lin's testimony, on the other hand, was straightforward and presented a rational and logical narrative. Ding and Jiang were two disgruntled employees with an investment dispute between them and the employer. That dispute was the motivating factor in their decision not to work. When the employer offered them a rest period in good faith, they simply asked for their pay and never returned.

Furthermore, Ding and Jiang's narrative seems incredible for a number of reasons. First, Lin did not have authority to hire and fire employees. She was simply a manager at the restaurant. The authority to hire and fire lay with Cao and Cheng. Ding and Jiang have both admitted that they never received any notice of termination from Cao or Cheng and never reached out to the owners after December 8, 2017. The ALJ contends that it is irrelevant that neither Ding nor Jiang asked the owners to return to work after December 8. They made their request to Lin, who was an agent of the Respondent and served as an intermediary between the owners and the employees in all work-related issues. However, Ding and Jiang never made a

request to Lin to return to work. Even if they did, if Lin ignored their request as the ALJ implied, the rational reaction would have been to go straight to Cao and Cheng. Ding and Jiang knew that Cao and Cheng were the majority shareholders and the ultimate decisionmakers with regards to hiring and firing decisions. Ding and Jiang had their contact information, including phone numbers and WeChat information, and had reached out to the owners before, specifically with regards to the investment dispute. Yet Ding and Jiang did not reach out to Cao and Cheng when they were supposedly "fired". This is because they were not fired and their walking off the job had nothing to do with unsafe working conditions or health concerns. Rather, they were trying to leverage their absence from the restaurant to gain a favorable bargaining position in their investment dispute.

Additionally, Ding and Jiang were partners in the business and each owned 5% of the share in Matsu Corp. Both employees were essential to the restaurant and Matsu Corp. had cause to fire them on previous occasions due to complaints and misbehavior but did not exercise that option. It is irrational that Matsu Corp. would not fire them then, but would instead choose to fire them in December, in the middle of the holiday season when the restaurant was busy, a big order was due, it is hard to find replacement workers, and the Ding and Jiang collectively own 10% of the restaurant. Tr. 44:10-19; Tr. 118:21-119:1. This narrative does not make sense.

The Administrative Law Judge pointed to the fact that Ding and Jiang were given time off during a busy season as proof that they were terminated for protected concerted activity for mutual protection. "If completing the big order was a priority, it is beyond my understanding why Ding and Jiang could not work their normal shifts and have other workers substitute for the 1 a.m. – 6 a.m. shift. Clearly, the Respondent was upset that Ding and Jiang had the temerity to refuse working the early morning shift." ALJ Decision 9. The ALJ is completely ignoring

Respondent's valid explanation for giving Ding and Jiang time off. The two employees were reporting health problems and the employer gave them time off to rest. The ALJ's reasoning only makes sense if he takes it as a given that there was animus towards Ding. There was no sufficient evidence to create a presumption that Respondent harbored any animus towards Ding and Jiang.

The ALJ cited affidavits from Lin and Cheng admitting that Ding and Jiang were discharged for refusing to work. ALJ Decision 9:35-39. He claims this is the most damaging piece of evidence in favor of the view that Ding and Jiang were fired. *Id.* However, Lin and Cheng were not familiar with the English language. Their previous counsel, who did not speak Chinese, prepared the affidavits and did not provide a translator or read the affidavits back to them in their own language before asking them to sign. Tr. 50:18—51:21. The ALJ states he empathizes with the language barrier, but asserts that the previous attorney had an obligation and duty to represent his two clients and to refuse their signatures unless they fully understood. Tr. n.12. Such a ruling will punish respondents for the language barrier and the mistake of their previous attorney. This situation calls for an objective evaluation of the evidence. A language barrier indicates that the affidavits might not reflect the views of the affiants. If that is the case, the contents of the affidavits should be evaluated accordingly. Criticism of the previous attorney and laying out the steps the attorney could have taken do nothing to add to the accuracy of the affidavits. Ultimately, that is what matters. Stating that the affidavits are the most damaging piece of evidence, even while acknowledging the language barrier, completely downplays the problems introduced by the language barrier. The ALJ relied too much on the faulty affidavits, coloring his decision of whether Ding and Jiang were fired.

IV. GENERAL COUNSEL FAILED TO SHOW UNDER THE WRIGHT LINE ANALYSIS THAT DING AND JIANG'S TERMINATION WAS MOTIVATED BY THEIR ENGAGEMENT IN PROTECTED CONCERTED ACTIVITIES

In order to determine whether an adverse employment action violated the Act, the Board applies the analysis articulated in *Wright Line,* 251 NLRB 1083 (1980). General Counsel must first prove, by a preponderance of the evidence, that the employee's protected concerted activities were a substantial or motivating factor in the employer's decision to fire them. *Manno Electric, Inc*., 321 NLRB 278, 280 (1996). Proof of an employer's motive can be based on direct or circumstantial evidence. *Ronin Shipbuilding,* 330 NLRB 464 (2000). Discriminatory motive can be stablished through statements of animus directed to the employee or about the employee's protected activities *Austal USA, LLC,* 356 NLRB 363, 363 (2010).

The General Counsel did not establish that the Ding and Jiang's protected concerted activities were a substantial or motivating factor in the employer's decision to fire them. First, the Ding and Jiang were not engaged in protected concerted activities, as has already been discussed. Their refusal to work was motivated by an investment dispute and not labor conditions. Second, Ding and Jiang were not fired. They were given time off to rest and recover and never reported back to work. Yet even if the ALJ was correct in his finding that Ding and Jiang were engaged in protected concerted activity and were fired, General Counsel failed to show by a preponderance of the evidence that their alleged termination was motivated by any alleged protected concerted activity. The ALJ cites testimony that the owners asked Ding and Jiang not to return to work after December 8 despite the restaurant being busy as proof that the owners harbored animus towards Ding and Jiang. (ALJ Decision 9). However, Respondent put forth credible testimony that Ding and Jiang were given time off for health reasons Ding and Jiang themselves were claiming due to the stressful work.

The ALJ further quotes testimony from Ding that Lin said there would "be consequences" if he did not work on the big order. *Id.* However, this testimony is uncorroborated and self-serving. Jiang did not report receiving any such threats despite the fact that he also refused to work the big order. Lin testified credibly under oath that she never made any such threats. The testimony of the threat is self-serving and should be discredited. Taken together, these testimonies do not show by a preponderance of the evidence any animus towards Ding and Jiang. General Counsel has failed to present a prima facie case under the Wright Line analysis that the termination of the employee's was motivated by protected concerted activities.

CONCLUSION

For the reasons set forth above, Respondent respectfully requests that this Board reject the ALJ's Decision and Order and rule that Respondent did not terminate Ding and Jiang in violation of 29 U.S.C. § 158 or remind the matter for a new hearing so that additional evidence can be presented regarding the investment dispute.

Dated: January 21, 2019

Xue & Associates, P.C.
Attorneys for Respondent

By: */s/ Benjamin Xue*
Benjamin Xue, Esq.
1 School Street, Suite 303A
Glen Cove, NY 11542
Tel.: (516) 595-8887
Fax: (212) 219-2275